NO. 2640

United States

Circuit Court of Appeals

For the Ninth Circuit

WORTHEN LUMBER MILLS,

Appellant,

vs.

ALASKA JUNEAU GOLD MINING COMPANY,

Appellee

Brief for Appellant

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1

JOHN RUSTGARD,
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INDEX TO CHAPTERS

BRIEF OF APPELLANT

STATEMENT OF CASE.

For a period of thirteen years before the commencement of this action, the defendant below and its predecessors in interest had been operating a sawmill on the shores of Gastineau Channel, within the corporate limits of the town of Juneau, had established booming grounds for logs along the beach, had been in the habit of towing the logs up to the mill over the tide waters near the shore, and had built platforms over tide waters, on the seaward side of and adjoining the city street, for use as lumber yards.

At the time of the commencement of this action, appellant was in peaceable possession of the premises in question and had driven a large number of piles on the tide flats between its booming grounds and the street, and was placing a platform thereon for use in connection with its lumber yards. This action was instituted to enjoin appellant from maintaining this structure and to allow appellee to take possession of and erect a wharf over appellant's said booming ground. Appellee obtained the decree as prayed for and which, in effect, authorizes appellee to construct a wharf over the premises occupied by appellant for lumber yards and over the waters used

by it for floating logs up to its mill. This appeal is from that decree.

Appellee contends that it is the owner of the upland down to line of mean high tide and that as such it has a vested, absolute and exclusive right to wharf out to deep water over the tide lands and waters occupied and used by appellant, and that by reason of appellants obstruction of the navigable waters in front of appellee's upland, the latter has suffered special injury different in character from the injury suffered by the public.

Apellant answers:

1. That no one, whether littoral owner or not, has any right to wharf out over navigable water except by leave of the Secretary of War in pursuance of statutes of the United States in that behalf enacted.

2. That appellee, upon the facts in this case, can have no title, if any, to the upland except under a millsite location, and that, in Alaska, a millsite cannot be laid within sixty feet of navigable waters for the reason that such strip of waterfront is reserved by the government for a public highway, and that if, nevertheless, a millsite is located clear down to line of high tide, the public have a right of way over the sixty feet of it adjoining the water, and that therefore no littoral right attaches to a millsite in Alaska, but that all such rights have in that territory been reserved for the public.

3. That even if the court should hold that there is no such road reservation in front of appellee's alleged premises, there is in this particular case a public

street constructed and maintained by the town of Juneau known as Franklin street, in front of the premises here in question, which street is below line of mean high tide and therefore *borders* on navigable water.

The law is well settled that where a public highway *borders* on navigable water the right of access between the street and the water is public and not a private right, or, as is said, a waterfront street cuts off private littoral right. Under the facts in this case appellee has, therefore, suffered no private injury, but the wrong complained of is purely a public wrong and can be redressed only at the instance of the public.

Appellee's Title.

Appellee in its complaint asserted title to the upland from three separate and conflicting sources: (1) That the upland is mineral land and that as such the appellee holds it under the "General Grant" lode location; (2) that it is non-mineral and as such is held as millsite "A" and millsite "U"; and (3) that certain Indians, prior to any lode or millsite location, owned and occupied it under the law of May 17, 1884, and that, being prior in time, their rights were superior, and they therefore owned the upland until they conveyed it in 1913 to appellee.

The learned court below found that appellee held title under all three of these conflicting claims. (p. 44.)

Appellant contends that appellee cannot possibly

hold under more than one of these titles, for to say that one is valid is tantamount to asserting that the others are not. The question is: Which is valid? If the premises are mineral and "General Grant" is a valid lode location, then the millsites must be invalid, because no mineral ground can be taken for millsites. If, on the other hand, the millsites are valid, the premises must be non-mineral in character and the "General Grant" is therefore invalid.

Again, the "General Grant" was located in 1894; the millsites still later. The Indians, so it is alleged and so the court found, settled upon the premises prior to 1884 and continued to occupy and claim them until 1913 when their title was purchased by appellee. The law under which this Indian title was found to be good provides:

> "That the Indians, or other persons in said District, shall not be disturbed in the possession of any land actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

It is evident that, inasmuch as the title to the premises in question was in the Indians under this law, the premises were not open either to mineral or non-mineral location by others. Ergo, if the Indian title was good, neither the lode nor the millsite locations were valid or of any account.

Inasmuch as the finding of the lower court to the effect that all three of these antagonistic titles were valid and vested in appellee, it is obviously erroneous

and can form the basis of no legitimate decree. It devolves upon this court to determine upon the law and the evidence under what title, if any, appellee holds the upland.

No evidence as to question of title to the upland was offered or introduced by appellant.

The Lode Location.

Appellee introduced evidence showing the location of the "General Grant", and then proceeded to attack this title by showing that subsequently and in 1911 the Land Department adjudged the premises covered by this claim non-mineral and refused the patent. At about the same time appellee located the "A" millsite and in 1913 the "U" millsite, on the theory that the ground was non-mineral, and then purchased the lode location.

Subsequent to the commencement of this action and, in fact, subsequent to the joining of issues, appellee applied for patent to these millsites. In making this application it was necessary, under the rules of the Land Department, for the applicant to swear and for the surveyor to certify that the land was non-mineral in fact. Under these circumstances, appellee is at this time estopped from setting up that the land is essentially mineral and that "General Grant" lode is a valid location.

But, in addition to this, appellee, for the purpose of further showing the invalidity of the lode location, placed a mining engineer on the witness stand who testified, at appellee's request, that the land was non-

mineral in fact. This was never controverted by appellant. Under this evidence it must be held that the lode location was void.

The Millsites.

The "A" millsite was located July, 1911, but it was not actually occupied for millsite purposes, if for any, till after the street was built, and public land cannot be taken and segregated simply by "locating" it. Aside from the Indian title, therefore, the premises covered by the "A" millsite were public land at the time the street was constructed.

The "U" millsite, which covers most of the ground in dispute, was not located till February 15, 1913, after the street had been in operation nearly a year. So far as the tract covered by this location is concerned, the premises belonged to the public domain at the time the street was built, except, of course, for the Indian title.

The Indian Title.

Appellant most earnestly contends that there is no evidence in the records sufficient to support the court's findings that the Indians had a good title to the premises in question, nevertheless, inasmuch as appellee alleged and the learned court below found as a fact that the upland was occupied and owned by certain Indians under the law of 1884 until they sold to appellee in 1913, after Franklin Street was constructed, appellant is disposed to accept the consequences of that finding and to treat it as binding on this appeal. Appellee, having lead the court to make this finding, is estopped from attacking it.

There were three Indian titles set up: First, the title of one Jackson to what is designated as Lot 2 on Exhibit Y and designated as "Chief Johnson or Fish House Lot" on the map attached to the court's findings (p. 48). But this tract has nothing to do with the case. Second, the Johnson family claimed Lot 1. And third, Jimmie Bean claimed Lot B (p. 48). Deeds to these tracts were executed in favor of appellee in 1913.

Appellant now contends that the Indian rights under the Act of 1884 are not assignable and that the deeds operated simply as an abandonment of their rights. (Ch. III.) By reason of this abandonment, the premises reverted to the public domain. Whatever right, if any, appellee has to the upland by reason of the millsites attached after this abandonment by the Indians, which, as has already been pointed out, took place after the street had been constructed by the city.

Appellee insists that there is no road reserve between millsites and navigable water. This is a legal question discussed in Chapter IV of this brief.

Appellee attacks the legality of the street on the ground that it was constructed over its premises without condemnation proceedings and without any *express* permission from the upland owner.

Appellant, however, contends:

1. The legality of the street cannot be assailed in a collateral proceeding. While it is conceded that it is a street *de facto*, it must be treated as such until vacated in direct proceeding against the owner, the city. (Chapter V-A.)

2. That at the time the street was constructed (in 1912) the upland belonged to and was in the possession of certain Indians who subsequently (in 1913) executed deeds therefor to appellee. That by reason thereof the latter took the land with the servitude imposed upon it during the ownership of appellee's grantors. (Ch. V.-C.)

3. Even if the street were constructed without the express consent of the upland owner, it could not be vacated even in a direct proceeding, much less on collateral attack, because:

(a) The upland owner, by allowing the city to expend large sums of money in constructing and maintaining the street, without any protest, is, at this time, estopped from asserting any right to have it closed or vacated. (Ch. V-D.)

(b) The street was in operation as a public thoroughfare at the time appellant purchased the sawmill properties, and it purchased in reliance upon the protection which that street afforded against any claim of littoral owners. (Ch. V.-D.)

(c) Even if appellee, or other alleged upland owners, were not estopped by laches, but though the street had been constructed over the protest of the land owner, the courts will not, even on direct attack, close a public thoroughfare, but will relegate complainant to his action for damages and leave the street intact. (Ch. V-E.)

4. The laws pertaining to Alaska reserve to the public ingress and egress on all waters of the Territory, and, in addition thereto, reserve a roadway

sixty feet wide over all non-mineral ground along navigable waters; and that, for this reason, whether the street is "legal" or "illegal", an upland owner on such lands in Alaska has no littoral rights. (Ch. IV.)

5. At the time the street was constructed, and, if not at that time, then afterwards, and before appellee's rights to the upland attached, the upland was public domain and the street became a public thoroughfare by reason of the right extended by Section 2477 R. S. (Ch. V-B.)

There is no conflict in the evidence upon any of the questions involved upon this appeal. The dispute arises over the legal construction to be placed upon the facts disclosed at the trial. These facts have been recited in the foregoing statement.

Appellant excepted to the various findings of facts and conclusions of law made by the lower court and requested various other findings of facts and conclusions of law which were refused by the court, and to which refusal exceptions were duly taken. These exceptions are embodied in the assignment of errors, and as their reiteration at this place could in no way contribute to the further elucidation of the problems before the court, they are omitted.

Inasmuch as this case may have to be submitted upon briefs on behalf of appellant, and inasmuch as the maps attached to the printed records have been so reduced in size as to be in many details unintelligible, the court is respectfully referred to the maps attached to the original transcript for a better and clearer understanding of the situation.

But it should be borne in mind that appellee's Exhibit Y does not show what improvements are actually on the ground, but what it expects to place there in the future (pp. 142-3).

ARGUMENT.

I.

The Street Cuts Off Littoral Rights.

For the sake of the argument, let it be conceded at this time that appellee is the owner of the upland down to the line of mean high tide. Let it also be admitted that the street is legally established as a public thoroughfare. It is yet contended that this street does not cut off appellee's littoral right, because, (1) the street is erected below line of mean high tide, and (2) it is so constructed that the upland owner may pass over it and into the navigable waters on the seaward side of it.

1.

The doctrine that a public thoroughfare bordering on navigable water cuts off from the upland owner a private right of access to navigable water and vests such right in the public, is too well established to justify extended discussion.

McCloskey vs. Pacific Coast Co., 160 *Fed.*, 794 (800);

Barclay vs. Howell's Lessees, 6 *Pet.*, 498;

Potomac Steamboat Co. vs. Upper Potomac Steamboat Co., 109 *U. S.*, 672;
Village of Pewaukee vs. Savoy, 50 *L. R. A.*, 836;
Barney vs. Keokuk, 94 *U. S.*, 324; (340)
Backus vs. Detroit, 49 *Mich.*, 115 (43 *Am. R.* 447);
Turner vs Peoples Ferry Co., 21 *Fed.*, 90;
The Schools vs. Risley, 10 *Wall.*, 91;
Town Institute vs. Crothers, 40 *Atl.*, 261;
Smith vs. St. Louis Public Schools, 30 *Mo.*, 290.

It is, however, contended that this applies only when the street is constructed on or along the line of mean high tide. But no such contention finds support in any authority cited. Nor do the reasons upon which the doctrine in question rests allow any distinction in legal effect of a street along line of mean high tide and one below that line.

The law that a public street bordering on navigable waters cuts off the littoral right is based upon the doctrine that navigable waters are a public thoroughfare clear up to line of mean high tide, but that the public have no right to go over this navigable highway to the private premises adjoining it. The right to do so is therefore a private right vested in the land owner adjoining the water. It is for this reason, and none other, that the upland owner may bring action to enjoin obstruction of navigable waters in front of his premises, because such obstruc-

tion, though a public wrong, is also a private wrong to the extent it interferes with ingress to and egress from the private land. Where, however, a public thoroughfare intervenes between the navigable water and the private premises, the right to go from the dry highway to the highway on the water becomes a public right and ceases to be a private privilege. Interference with such right is therefore purely a public and not a private wrong, and cannot be enjoined at the instance of private individuals.

This theory was clearly emphasized by this court in *McCloskey vs. Pacific Coast Co., supra*, on page 800, where it is said, paraphrasing the language of an earlier authority:

> "If a public street exists so that its boundary line and water of a navigable lake meet, the riparian right incident to the land composing the street belong to the public and there is no zone of private right between the street and the lake, but the public right is continuous from the street to the waters of the lake."

This court then quotes from the same authority as follows:

> "In such situation the wharfing privileges and other incidents of the shore are appurtenant to the public right in the street, leaving no line of paramount private right between the street and the water."

After citing numerous authorities, this court then concludes:

> "The doctrine so affirmed rests upon the theory that the private right of access has been

merged in a public right which is inconsistent with its exercise, and, in the application of the doctrine, it is immaterial whether the title to the intervening street is vested in the public or remains in the adjacent owner."

In conformity with the last sentence of the above quotation, it was held that the same rule of law applies though the public have only an easement in the street and though the fee title to it belongs to the upland owner. In this respect this court followed

Barney vs. Keokuk, supra;
Backus vs. Detroit, supra;
Rowan vs. Portland, 8B Mon ., 232.

It is, therefore, immaterial whether the fee to the street in question be in the city or not. The right of the public to use the street establishes *ipso facto* the public right of access to it from the water, and *vice versa.*

The lower court argues astutely that the street erected below high tide has a different legal status from a street along line of high tide, because the former is erected upon premises over which the public have a right to pass. The sophistry of the argument is readily exposed by pushing it to its ultimate conclusion.

The court ruled that the ~~public~~ land owner as such had a vested right to erect a wharf over tide lands and to water deep enough to accommodate ocean-going vessels. How is it possible that the littoral owner has such right if the public has an inherent

right to use the same premises for a street? If the appellee erects the proposed wharf, will the court hold that the public has the same right to that wharf and to its use as the appellee, on the theory that it is built over premises belonging to the public or over which the public has an easement? Certainly not. The lower court decided the case on the theory that appellee has a right superior to that of the public to erect a wharf and use it to the exclusion of all others. This is in itself a denial of the other proposition that the public had the right to be left undisturbed in the use of the premises and waters over which the wharf was built.

The moment it is conceded that the public as such had a right to use the tide lands for a street, that moment it is conceded that the appellee had no individual rights there. So, also, the moment it is conceded that the public as such had the right to use the street, that moment it is conceded that the right to wharf out is a public right, and thereby appellee's case falls, for to maintain this action appellee must prove that the nuisance complained of is a private and not a public nuisance.

The sophistry of the lower court is the natural result of its fundamental fallacy that, in spite of the fact that the navigable waters are a public highway clear up to line of mean high tide, the littoral owner has yet an inherent and vested right to obstruct that highway by wharves, no matter how the public may thereby be affected, and the statutes of the United

States notwithstanding. This confusion of the right of access with the right to wharf out is at the bottom of the subtle error. The lower court deliberately reversed the legal principle involved. He held, in effect, that the public right on the tide land was subject to and must yield to the littoral right to wharf out, whereas, the law is well settled that the littoral right can be exercised only subject to the public right and in conformity to such rules and regulations as are prescribed by Congress. This subject will be discussed further in Chapter VI of this brief.

The fact is, that in Alaska the municipalities have been delegated the power over the waterfront and exclusive authority to wharf out. This being so, the city could lawfully construct a waterfront street at any place without leave of the upland owner.

Subsections 4 *and* 6 *of Sec.* 627, *Compiled Laws of Alaska.*

The learned court below had no difficulty in arriving at the conclusion that the use of the tide land for the construction of this street is the kind of use to which public officials are authorized to put these premises. It should be less difficult to arrive at the better settled rule that whatever right the public have over tide lands is paramount to purely private rights of access, and that appellee therefore is not in position to complain.

In conclusion, it remains to be pointed out that to hold that a street along line of mean high tide cuts off the littoral rights, but one which happens at one

short point to be laid below this line preserves the right intact, involves not only a disregard of the reasons upon which the courts have uniformly held that a highway bordering on navigable water vests in the public the right to wharf out from the street, but leads to disastrous practical results. The courts have uniformly held that the main object of a waterfront street is to give the public an easy access to navigable water. Under the theory of the lower court, the closer the street is to deep water, the less right do the public have to wharf out. This would rob a waterfront street of its value as such.

2.

The second argument advanced by the lower court, viz: that the street is so constructed that the upland owner may pass over it and into the waters on the lower side of it, and that therefore it does not cut off the littoral right, has already been partly disposed of.

It would seem elementary that it is not the physical construction of the street which determines the respective and relative rights of the public and the upland owner. It is not the fact that the street forms a barricade, but the fact, that, by reason of the public right upon the street, the private right of access has merged in the public right of access, which renders obstruction of that access a public nuisance instead of a private nuisance.

In none of the cases above cited have the water-

front streets involved formed barricades. On the contrary, they have apparently rendered access to the water much easier. But that right of access had, by means of such street, been changed from a private to a public right. On the other hand, if there ever was a street which formed a barricade between upland and deep water, Franklin street does. It is built on piles from twelve to twenty feet high, with a railing of timbers forty inches high on either side of the driveway. (P. 99 and Ex. 4, 5 and 11.)

Appellee's Authority.

Appellee relies upon *Dalton vs. Hazlett*, 182 Fed. 561, to sustain the proposition that the right of way at or below mean high tide does not cut off the upland owner's littoral rights.

There are expressions in that case which, taken separate and apart from the facts to which they apply, would warrant such interpretation. These facts are stated by this court, on page 570, as follows:

> "The easements and rights of way referred to by appellant are those of the Copper River Railway, as shown on the map attached to the complaint as an exhibit showing the townsite of Cordova. But this map also shows that, while the line of the railroad crosses a portion of the tide flats in front of the townsite of Cordova, there is a strip of upland owned by plaintiff lying between the line of the railroad's right of way and that portion of the shore in front of

which the defendant's wharf was being built at the time of the commencement of this action."

The decision was then based on the fact that plaintiff did have below the right of way in question and above mean high tide, a tract of land which yielded him the certain littoral rights which defendant was charged with obstructing.

II.

Private Individual Not Entitled to Redress Against Public Wrong.

In the McCloskey case, this court said:

"One who has been divested of such littoral rights (by a street) cannot maintain a suit to enjoin obstruction to his access to navigable waters in front of his land, the case coming within the general rule that individuals are not entitled to redress against a public nuisance."

This rule applies to the case at bar.

29 *Cyc.* 1208;
29 *Cyc.*, 324;
Gould on Waters, Par. 122 *and cases cited;*
Haggert vs. Stehlin, 22 L. R. A., 577;
People vs. Park & O. R. Co., 76 *Cal.*, 156.

If appellee could require the court to restrain appellant from maintaining a structure below Franklin street, appellant could likewise require the court to restrain appellee from erecting the proposed wharf at the same place. If not, why not?

III.

Indian Titles Not Alienable.

The lower court held that appellee was the owner of the premises designated on Exhibit Y as Lot B and Lot 1, and designated on the map attached to the court's findings (p. 48) as Jimmie Bean Lot and Jimmie Johnson Lot, respectively, by means of deeds from certain Indians. (Ex. X and Z.)

It was alleged by appellee that two Indians, Jimmie Bean and Jimmie Johnson, were the owners of these tracts and in possession thereof until after the street in question was constructed and until the deeds were executed in 1913 (pp. 12 to 15). This the lower court found to be true (pp. 44 and 45).

Even if this court finds a valid Indian title up to the time of the execution of the deeds, appellant contends those deeds operated simply as an abandonment of the premises to the government, and that therefore any rights to the premises which appellee can rely upon did not become effective till the Indians executed these abandonments. (23 Stat. L. 24)

The provision of Section 8 of the Act of 1884, under which it is claimed that plaintiff established ownership of certain land here in question, has already been quoted. This Act is called the Organic Act of Alaska and is the first one to establish any form of civil government for the Territory. The same section from which the quotation was taken cautiously concludes: "But nothing contained in this Act shall

be construed to put in force in said District the general land laws of the United States." In course of subsequent years Congress has from time to time prescribed the terms on which "Indians and other persons" "may acquire title", viz:

By the Act of March 3, 1891, the laws pertaining to townsites were extended to Alaska, (26 Stat. L. 1095; Chapter 561, Sec. 11). This court has held that thereafter the rights under the Act of 1884 became, on a townsite, merged in the rights under the said Act of March 3, 1891; or, that the latter right displaced the former.

McGrath vs. Valentine, 167 *Fed.*, 473 (477).

By the same Act (Secs. 12 and 13 of the Act of March 3, 1891), the right was extended to citizens to obtain patent to lands occupied for trade and manufacturing purposes.

By the Act of May 14, 1898, (30 Stat. L. 409, Ch. 299), the homestead laws were extended to Alaska, but this was not effective in practice for the reason that the general homestead laws applied only to surveyed lands, and no surveys had been made in the Territory. By the Act of March 3, 1903, (32 Stat. L. 1028), an amendment was made to cure this defect. By Section 10 of the Act of May 14, 1898, it was further provided:

> "That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the waterfront of any stream, inlet, bay, or sea shore for landing

places for canoes and other crafts used by such natives."

This bestows upon the Secretary the right to determine what lands the Indians should be left in possession of, and to that extent abrogates the law of 1884.

The final disposition of the subject, so far as the duties of Congress are concerned, is found in the Act of May 17, 1906, (34 Stat. L., 197), which provides:

> "The Secretary of the Interior is hereby authorized and empowered, in his discretion, under such rules as he may prescribe, to allot not to exceed 160 acres of non-mineral land in the District of Alaska to any Indian or Eskimo, of full or mixed blood, who resides in and is a native of such District and who is the head of a family or is twenty-one years of age, and the land so allotted shall be deemed a homestead of the allottee and his heirs in perpetuity *and shall be inalienable and non-taxable* until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preferred right to secure by allotment the non-mineral land occupied by him, not exceeding 160 acres."

It is obvious that Congress has at this time fully provided for the manner title may be acquired both by "Indians and other persons" to any land occupied under the law of May 17, 1884, or othewise.

Is the protection of and promise by this law alienable by the Indians?

This question was answered in the negative most effectively by the distinguished Judge Wickersham in *United States vs Barrigan, et al.*, 2 Alaska Rep., 442-452. The court said:

> "Such a rule would completely nullify the Act of Congress, or at least permit the Indian to do it, and thus leave him a prey to the very evil from which Congress intended to shield him. Congress alone has the right to dispose of the lands thus specially reserved *for his occupancy, and any attempt to procure him to abandon them is void.* He is a dependent ward of the government and his reserved lands are not subject to disposal or sale or abandonment by him."

This language is quoted with approval by Honorable Clay Tallman, Commissioner of the General Land Office, in his letter of April 30, 1914, to the Register and Receiver at Juneau, Alaska, touching the application of patent by Dupont Powder Company, and also in his letter of April 23, 1915, to the same office, relative to the case of Johnston vs. Sheldon. In the last letter, after an exhaustive discussion of the authorities, the Commissioner says:

> "Considering the proposition, on principle, and on the terms of the proviso itself, and in the light of the Russian-American Packing Company vs. U. S. (199 U. S., 570), in particular, this office is of the opinion that possessory claims under the provisions of the Act of May 17, 1884, are not transferable; that said proviso protects

only such persons as were in possession of lands at the date of said Act."

In the Russian-American Packing Company case, the Supreme Court held:

> "It is quite clear that this section simply recognizes the rights of such 'Indians, or other persons', as were in possession of lands at the time of the passage of the Act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress."

The Court further asserted:

> "This Act was intended merely as a preliminary to future legislation and for the temporary protection of Indians and other settlers."

That the provision of the Act of 1884, above referred to, was only intended as a temporary arrangement to preserve the *status quo* of the Indians and others until the conditions of the then unknown country could be investigated and suitable legislation formulated, is brought out most forcibly by Section 12 of the same Act, which provides:

> "That the Secretary of the Interior shall select two of the officers to be appointed under this Act, who, together with the Governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory; what lands, if any, should be reserved for their use; what provision shall be made for their education; what rights by occupation of settlers should be recognized; and all

other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed, when the land laws of the United States shall be extended to said District."

Obviously, the proviso of Section 8 was only a declaration that the situation with reference to public lands should remain in *status quo* until the investigation contemplated by Section 12 had resulted in more definite knowledge of the needs of the country. The subsequent legislation must be treated as displacing the *status quo* proviso and as not only prescribing but limiting the various methods by which land can be held and title obtained.

It will now be observed that none of these statutes render Indian titles alienable. On the contrary, the natives were treated as wards and are strictly prohibited from transferring their lands or allotments. There can be no doubt that possession under the law of 1884 may be converted into an Indian homestead under the Act of 1906. That is subsequently, in fact, provided for by that Act. If the latter is not alienable, it is difficult to see how the inchoate right to such homestead is subject to alienation.

In construing these statutes, it should be borne in mind that it always has been the policy of the government to protect the Indians in the possession of the soil by prohibiting them from transferring their allotments or reservations, and a divergence from that policy should be clearly expressed before the courts

will hold that it was intended. In this case the intent of Congress to adhere to the old policy is unmistakable, and the language of Judge Wickersham above quoted is directly to the point.

Appellee's Authorities.

Appellee relies upon the decision of this court in *Heckman vs. Sutter*, 119 Fed., 83. It will be observed that in that case both sides to the controversy evidently assumed that if the native in question had the rights contended for, his grantee stood in his shoes. The question here involved was not raised in that case, was not discussed by the court, and was not considered. The one and only question considered either by the court or the parties was the extent and character of the original Indian rights.

Moreover, the court cautiously observed that it ruled as it did because there had, at that time, been no "subsequent legislation" on the subject.

The effect of the departmental decisions is treated in the last subsection of the next chapter.

IV.

SIXTY FEET RESERVED FOR ROAD.

It does not seem possible for appellee at this time to lay claim to the upland by means of the General Grant lode location. Not only does appellee allege and the court find that at the time this claim was lo-

cated (in 1895, Ex. "H-1", p. 242) the premises were owned and in the possession of the Indians, but appellee introduced evidence showing that the claim was adjudged non-mineral by the Land Department (pp. 167 and 168). And followed that up by calling a mining engineer as a witness to prove the ground was non-mineral in fact (p. 176).

But if this attack upon "General Grant" is not sufficient to estop appellee from claiming title under the lode location, the fact that appellee located the premises as millsites and is now actually applying for patent to the ground as millsites, (pp. 154, 157, 160, 162, and 164, Ex. 7) should be an effectual estoppel of any claim to the premises under any mineral location. When application for patent is made for millsite, the rules of the department require that applicant swear and the surveyor certify that the land is essentially non-mineral. This having been done, the court will not allow appellee to claim the premises from the government as non-mineral and from the appellant as mineral ground.

The only possible title by which appellee can legally claim the premises is, then, under the millsite locations. But in Alaska millsite locations cannot be lawfully located within sixty feet of the beach, for the reason that the government has reserved for public road a strip of that width along all navigable waters in the Territory, except under mineral locations.

The Statutes.

In Section 10 of the Act of May 14, 1898, heretofore referred to, it is provided:

> "Ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or not."

If such right is reserved to the public it must be at the expense of the private upland owner.

And further on in the same section:

> "A roadway sixty feet in width parallel to the shore line, as near as may be practicable, shall be reserved for the use of the public as a highway."

This was immediately construed to apply to all public land grants in the Territory, and as such construction was supposed to materially hamper the development at Nome, where in 1899 the beach diggings were discovered, and the town built on the surf line, Congress relaxed the rule and in Section 26 of the Act of June 6, 1900, (31 Stat. L., 321, Carter's Code, p. 140), inserted this proviso, after extending the mining laws to tide lands:

> "And the reservation of a roadway sixty feet wide under the tenth section of the act of May 14, 1898, entitled, 'An Act extending the homestead laws and providing for rights of way for railroads in the District of Alaska, and for other purposes,' shall not apply to mineral lands or townsites."

This declaration in 1900 that the reservation shall

not apply to mineral lands and townsites is tantamount to the declaration that it shall apply to all other lands. Whatever justification there originally might have been for a doubt as to whether the reserve applied to other grants than those provided for by the law of 1898 itself, this subsequent declaration by Congress should be conclusive for the courts.

On this subject the Supreme Court says:

> "If it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. * * * Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. * * * A thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter."
>
> *United States vs. Freeman*, 3 *Howard*, 556 (11 L. Ed., 724).
>
> "We have already said that the correctness of the original interpretation of the earlier Acts increasing pay was at least doubtful. Constructive allowances are not entitled to favor. And it is certain, though the allowances in question, so far as made prior to the Act of July, 1862, were confirmed by that Act, that its prohibition of that construction in future, as applied to the

Act of 1861, must be taken, at least, as a legislative disapproval of the construction itself. It cannot, then, be assumed, that when the Act of 1864 was passed, Congress intended that this disapproved construction should be applied to it."

United States vs. Gilmore, 8 *Wallace*, 330 (19 L. Ed., 396).

Justice Miller, sitting in Circuit Court, used the following language:

"While it might not be true that rights existing prior to the explanatory or declaratory statute will be affected by that declaratory statute, yet, inasmuch as Congress or any legislative body has a right to pass a law for the future that a statute shall be held to mean so and so, while it may not affect past transactions, it is the equivalent to the passage of a statute of that character for the future, and while it is not necessary for us to decide here whether that declaratory statute affect any contracts or transactions prior to its passage, it is sufficient to say that after its passage it became a part of the law of 1867, (the former enactment)."

Stebbins vs Commissioners, 4 *Fed.*, 282.

The Supreme Court of Washington in a recent case said:

"The courts are not at liberty to speculate upon the intent of the statute where the legislature has put its own construction upon the statute by a later enactment."

State, ex rel., vs. Clausen, 116 *Pac.*, 7 (10).

To the same effect, in substance, was held by the Supreme Court in a more recent decision, where it is said:

> "The practical interpretation of an Act by the Secretary of the Interior, and by Congress in subsequent enactments, removes doubt as to original intent."
>
> *Swigart vs. Baker*, 229 *U. S.*, 187; (57 L. Ed., 1143).

Millsites being restricted by law to non-mineral ground, it follows that the provision of the statute above referred to applies to them. This is the view taken by the Department of the Interior, whose special duty it is to construe and apply these laws.

Alaska Copper Company, 32 L. D., 128 (131).
Alaska Mildred G. M. Co., 42 L. D., 255.

In the former case the Secretary said:

> "By the tenth section of the Act of May 14, 1898, it is provided that 'a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway,' along all navigable streams, inlets, gulfs, bays and seashore in Alaska. Being non-mineral lands, these millsite claims do not fall within the exception of mineral lands from such reservation provided by Section 26 of the Act of June 6, 1900, and therefore their shoreward boundaries could not lawfully be laid within sixty feet of the water's edge."

That this is the correct view is affirmed by such

illustrious jurist as Mr. Curtis H. Lindley, leading counsel for appellee, who says:

> "In Alaska the boundary line of a millsite cannot approach within sixty feet of tide water, i. e., the line of ordinary high tide."
>
> 2 *Lindley on Mines*, No. 521, (p. 1177).

It must be taken as settled, therefore, that in front of the premises here in question the public had a right of way over a strip sixty feet wide along line of mean high tide. This was not only in the form of an easement, but was a reservation untainted by any right of private individuals.

The wisdom of Congress in thus conserving to the public a free access of navigable water is quite clearly illustrated in this case, where it is shown that appellee has endeavored to grasp and is claiming an exclusive right to some 8,000 or 9,000 continuous feet of the most available water front in Juneau and vicinity (p. 178). If a change in the policy of the Government with reference to this subject be thought advisable, let the change come through Congress.

Appellee's Authority.

This court, in *Dalton vs. Hazlet*,, 182 *Fed.*, on page 571, expresses the opinion that the road reservation of the Act of 1898 applied only to the eighty rods reserved between land grants, and to nothing else.

In that case the court's attention had never been called to the proviso in Section 26 of the Act of 1900, which materially alters the situation, nor to the inter-

pretation of the two statutory provisos by the Department of the Interior in the case of Alaska Copper Company. This is the view taken of the Dalton case by the Secretary in *Alaska Mildred G. M. Co., supra.*

It is also obvious that the court's attention had not been called to the preceding proviso in the original section that, "ingress and egress shall be reserved to the public on the waters on all streams, whether navigable or not." Such right of ingress and egress by the public would seem to absolutely do away with private right of such access in Alaska.

The extreme caution with which Congress sought to preserve the shore for the use of the public is the predominating feature of this early enactment. This, perhaps, may be awkwardly expressed at times, and generally appears by parenthetical sentences evidently injected by way of amendments to the original bill, but the object, to give the public free access from the land to the water and from the water to the land, was never lost sight of, and that object should be borne in mind by the courts in giving effect to this and subsequent statutes.

Moreover, the court's interpretation of Section 10 of the Act of 1898, when carefully examined, is found to reduce the road reserve to a nullity. It is held that the statute of 1898 first reserves eighty rods between each grant on navigable waters, and over this reserve is another reserve of sixty feet for road,—a double reservation.

If the eighty rod tract is reserved, it would be un-

necessary to provide that some of it may be used for roads, because that right over all public lands has already been granted by Section 2477 R. S.

Even if this were not so, of what avail would it be to have a highway over every alternate eighty rod tract, if the right to continue the road over the adjoining tract did not exist? It is not thinkable that Congress intended to provide for roadways in segregate stubs of eighty rods each, as such would be of no use to the public.

It is incontrovertible, therefore, that the proviso as interpreted in the Dalton case renders it nugatory, but the court will not, except through inadvertence, hold a statutory enactment meaningless and to no purpose, and if this particular pronunciamento is adhered to in the future, it will not only render nugatory the provisos of 1898, but also the very explicit statutory interpretation of that proviso in 1900.

While undoubtedly the language employed in 1898 might have been much clearer, when the court has the option between construing a statute to mean nothing and construing it to mean something, it will adopt the latter, unless such construction is clearly inconsistent with the language used or with the general purpose of the enactment. But if it be construed to mean something, it must be construed to mean what is here contended for it.

Construction by Department Determinately Persuasive.

That the Land Department has encountered no difficulty at arriving at the latter view should have weight with this tribunal the same as it in the past has had weight with the Supreme Court:

> "The construction placed upon a statute by the officers whose duty it is to execute it, is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the Government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous."
>
> 36 *Cyc.*, 1140.
>
> *Jacobs vs. Prichard*, 223 *U. S.*, 200;
> *U. S. vs. Hammers*, 221 *U. S.*, 220;
> *U. S. vs. Cerecedo, etc.*, 209 *U. S.* 337;
> *U. S. vs. Finnell*, 185 *U. S.*, 236;
> *Hewitt vs. Schultz*, 180 *U. S.*, 139;
> *U. S. vs. Healey*, 160 *U. S.*, 136;
> *Railroad vs. Whitney*, 132 *U. S.*, 366;
> *U. S. vs. Moore*, 95 *U. S.*, 760.

In *U. S. vs. Moore, supra*, the court said:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons * *. The officers concerned are usually able men

and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *U. S. vs. Hammers, supra,* the court said:

"Conceding, then, that the statute is ambiguous, we must turn as a help to its meaning, indeed, in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed, have written them. At any rate, their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it *determinately* persuasive."

These observations apply equally to the subject discussed in the preceding chapter, where it was pointed out that the Department has held that Indian titles were non-alienable.

From what has been said, we deem it conclusive that, inasmuch as the appellee can be the owner of the upland only by reason of a millsite location, there is still a strip of ground next to navigable waters open to the public, and it is immaterial for the purpose of this case to determine whether such strip is in the nature of an easement only, or whether it is in the nature of an absolute reserve. Even if it be only an easement, the owner of the upland has no exclusive right of access to the ocean, for from a highway that right is a public right and not a private one.

V.

THE STREET.

Even if it be conceded that appellee hold a fee title to the upland, unencumbered by any public easement on the beach line, it will probably be admitted that if Franklin street is a public thoroughfare the right of access thereto from the sea is a public and not a private right.

But it is insisted by counsel that the street is not legally established because it was laid out and constructed without the permission of appellee and without any condemnation proceedings.

To this argument appellant answers:

A. The street is at least a *de facto* highway and as such cannot be attacked collaterally and can be vacated only in a proceeding instituted for that purpose against the city.

B. The street was located prior to the millsites and over public land, and is valid under the provisions of Sec. 2477 Revised Statutes, authorizing highways to be located on public lands.

C. Whether the land was public or belonged to the Indians at the time the street was laid out is immaterial, as in either case the grantee of land takes the land subject to the burdens and servitude imposed upon it while belonging to the grantor.

D. Appellee and its alleged grantors having, without objection, allowed the city to expend the public funds in constructing this street, are estopped

from afterwards questioning its legality.

E. Even if appellee is not estopped by laches the courts will not vacate a public highway or other public utility at the request of the land owner where such public improvement might be lawfully established by the exercise of the power of eminent domain. In such cases the courts will refer the complainant to his right of action for damages, because that is all he could get even on condemnation proceedings.

These propositions will be discussed *sereatim*, but first let us examine the evidence bearing upon the establishment of this street.

On the map attached to plaintiff's complaint, this street is named "city street". On appellee's Exhibit Y, introduced by it in evidence, the street is also named "city street", and on the plat prepared and used by appellee in the patent proceedings, (Exhibit 7), the street is shown and designated as "government road".

That plat was prepared before the trial of this case, and at that time appellee treated the street as "legal". At no stage prior to the trial has the right of the public or the city in that street been questioned. The illegality of the structure is evidently an afterthought aroused by an emergency which became apparent during the trial. Appellee's witnesses also, throughout the trial, referred to the street in question as the "city road", "street", "plank road", etc., interchangeably.

And the lower court in his opinion (p. 66) said:

> "In 1912 the city of Juneau planked over a strip —— feet running in front of plaintiff's upland. This suit was brought August 6, 1913. From 1912 to the last mentioned date the public have constantly used said street to such an extent that it has become one of the principal streets of the town. Plaintiff has never taken any steps to prevent the public from so using the 'street'."

The first step in the building of this thoroughfare was taken July 19, 1907, when the city passed an ordinance (Exhibit 9, p. 219) laying out the street and adopting the survey (Exhibit 10, p. 222).

The actual construction of the street in front of the premises here involved began June, 1912 (p. 109-191).

Prior to that time the ordinance and plat (Exhibits 9 and 10) had been lost from the city records and a new survey was made (p. 191). This last survey substantially followed the earlier survey, as will be seen by a comparison of the maps. (Exhibits 8 and 10).

The entire work was completed during the summer.

There was no objection made to this street, either by the appellee or its Indian predecessors. The city authorities had no reason to believe that it was less welcome than street improvements generally. Nor does the court find that any objection was made by

appellee or anybody else. The court simply finds that the appellee did not give its consent, but there is no other evidence to back up that assertion by the court than the mere statement of one of the witnesses that the permission of the appellee to build the street was not asked. The court, however, never found, as a fact, nor is there any evidence to indicate, that the Indians, who at the time the street was built, and for a year afterwards, occupied the premises in question, did not give their consent. The street has been used ever since as a public thoroughfare and is one of the best traveled highways in the city, affording an outlet to the Sheep Creek country, three and a half miles away, and now the center of operations of the famous Alaska Gastineau Mining Company and several other smaller concerns (p. 199), and is used by the appellee as well (p. 200).

A.

Highway Cannot Be Vacated on Collateral Attack.

A determinative feature of appellee's position is that it insists on receiving the benefits of the street without accepting the detriments. It leaves the roadway intact as a public thoroughfare but claims the right to invest it with legal characteristics foreign to public highways. Appellee yields to the city the right, and consequent duty, to maintain the street in a good, safe condition; yields to the public the right to use it; but claims for itself the sole right to pass from the street to the adjoining navigable waters.

It is perfectly apparent that appellee never intends directly to attack the validity of the street. It needs the street more than anybody else and could not get along without it. By making this collateral attack on the street it hopes to do what it neither would nor could do by direct attack,—it hopes to establish an anomalous highway which yields to appellee all the advantages without imposing any of the disadvantages of a public waterfront street.

And it is respectfully submitted that before appellee is authorized to question the legality of this street for any purpose its illegality should be settled by direct attack.

> "A public highway when once established, whether through fraud or not, vests in the public and cannot be vacated except by direct proceeding to which the public is a party."
>
> *Limming, et al., vs. Barnette, et al.*, 33 N. E., 1098, and cases cited therein.

In the case at bar the title to the street has vested in the city. Such title can not be affected by any judgments in this case. Nor should the appellant be required to defend the city's title. The fact that the street is built and operated by and in the possession of the city raises, on a proceeding of this kind, the conclusive presumption that it is lawfully established. Moreover, the presumption always prevails that, in absence of evidence to the contrary, public officials have done their duty, and that they obey the law. Even upon direct attack, in the absence of evi-

dence to the contrary, the presumption would prevail that the land owners (the Indians) gave their consent to the building of this street, or that if they did not, the legal requirements were complied with.

For the purpose of this case it is sufficient that the street is a *de facto* highway.

B.

Street Located Prior to Millsite.

The lode claims can not be considered, because appellee has proven and appellant admitted the ground is non-mineral, and, in the second place, was located at the time the premises here in question were the lawful property of certain Indians and not open to location by appellee's predecessor in interest. The only millsites involved are "A" and "U" millsites. The former was located in 1911 (Exhibit V). The latter was located in 1913 (Exhibit K-1), nearly a year after the street had been fully constructed.

The city established the site of the street by Ordinance 87 (Exhibit 9) and the survey (Exhibit 10) in 1907. At that time the land was public domain, (except for the inchoate right of the Indians).

Section 2477 Revised Statutes provides:

> "The right of way for the construction of highways over public lands not reserved for public use is hereby granted."

When the city council located the road by the ordinance and survey of 1907, this grant was thereby accepted. Any act of legally constituted authorities

to definitely fix the locus of the road is sufficient under this section to establish it.

Wells vs. Pennington, 2 So. Dak., 1; 22 N. W., 305;
Walcott vs. Skauge, 6 No. Dak., 382;
Wallowa County vs. Wade, 43 Ore.., 253; 72 Pac., 793;
Tholl vs. Koles, 65 Kan., 802; 70 Pac., 881;
Flint, etc., Ry Co., vs. Gordon, 41 Mich., 420.

Subsequent grantees take the land subject to such right of way.

McRose vs. Bottyer, 81 Calif., 122;
Estes etc. Road vs. Edwards, 3 Colo. App., 74;
Tholl vs. Koles, supra;
Wallowa County vs. Wade, supra;
Keen vs. Fairview, 8 So. Dak., 558; 67 N. W., 623.

In *Wells vs. Pennington, supra*, with reference to the territorial law declaring all section lines to be public roads, the court said:

> "The Act of Congress giving right of way for construction of highways over public lands, and the territorial laws declaring all such lines, as far as practicable, to be public highways, and designing such highways to be sixty-six feet wide, are notice to all persons filing on public lands, subsequent to the passage of these laws, that they take them subject to the right of way for highway purposes, if such section lines are found practicable for that purpose."

But even if we consider that at the time of the establishment of the street, either by the survey, the ordinance, or the actual construction, appellee had an inchoate right either by location or otherwise of millsites, this is not sufficient to withdraw the premises from the public domain to the extent of preventing the road being located. Not even the inchoate right of the Indians would prevent this.

Northern Pacific Ry. vs. Smith, 171 U. S., 260;
Frisbee vs. Whitney, 9 Wall., 187;
The Yosemite case, 15 Wall., 77;
Northern Pacific Ry. vs. Colburn, 164 U. S., 383;
Flint vs. Ry., 41 Mich., 420.

In *Northern Pacific Ry. vs. Smith, supra*, the court said:

> "It has frequently been decided by this court that mere occupation and improvement on the public lands, with a view to preemption, do not confer the vested right in the land so occupied; that the power of Congress over public land, as conferred by the Constitution, can only be restrained by the courts in cases where the land has ceased to be Government property by reason of the right vested in some person or corporation; that such a vested right under the preemption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser."

Inasmuch as appellee relies upon the millsite locations as giving it a right to the ground in question, let us examine the status of these locations in 1912, at the time the street was built. The "U" millsite had not yet been located. The "A" millsite was located in 1911 by marking the boundaries by appropriate corner posts; but millsites are not acquired by merely "locating" them on the ground. The only right to public land for millsite purposes is given by the Act of May 10, 1872, Section 2337, Revised Statutes. Under this section it is observed by Mr. Lindley:

> "It will thus be observed that the law divides patentable millsites into two classes: (1) Such as are used and occupied by the proprietor of a vein or lode for mining or milling purposes; (2) Such as have thereon quartz-mills or reduction works, the ownership of which is disconnected with the ownership of a lode or vein."
>
> 2 *Lindley*, 520.
>
> "The *mere location* of a millsite does not of itself segregate the land from the body of the public domain. A right to be recognized must be based upon possession *and use*."
>
> 2 *Lindley*, 521.
>
> "Mere intention or purpose on a certain contingency of performing acts of use or operation thereon will not satisfy the law."
>
> 2 *Lindley*, 521

No claim is made here that "A" millsite was ever

occupied or used for mining or milling purposes prior to or even after the street was built. There is some evidence introduced intended to prove that appellee was in possession of the "A" millsite since 1911. One of the witnesses is Lenore, and another witness is Whalen. Both testified that appellee had been in possession of the group of millsites in the neighborhood of "A" millsite, numbering some ten or fifteen, but the nature and character of that possession is not explained. The testimony is but a legal conclusion and sets out no facts. Witness Bradley testified something about possession, but he confessed he did not come to Alaska till 1914 (p. 152). There is no evidence whatsoever, that any improvements have been erected upon the ground in question by appellee. Lenore testified that the last part of 1912 appellee commenced some work upon the premises, (meaning upon the group of millsites), (p. 163-4). This was, in the first place, *after* the street was built; and, in the second place, there is nothing to show that this work had anything to do with the use of the premises as a millsite; and, thirdly, there is nothing to show that any such work was done upon the "A" millsite, and this court will not hold that even if some work was commenced upon the *group* of millsites during the latter part of 1912, that that fact in itself gives any prior right in appellee to "A" millsite, or segregates the latter from the public domain. And in the fourth place, the allegation that appellee was in possession of the millsites at the particular place here in

question is refuted by the latter's own allegation and the court's finding that the Indians were in possession.

> "As lands not mineral in character may be selected under various laws, the right to appropriate them for millsite purposes can not be exercised if any lawful possession is held by others."
>
> 2 *Lindley*, 521.
>
> "Millsites cannot be taken and held for the purpose of maintaining boarding houses, stores, sawmills, residences or wharves."
>
> 2 *Lindley*, 523.

The Indians being, as appellee claims, in lawful possession until the deeds were executed by them to appellee in 1913, the millsite locations did not attach.

As for "U" millsite, it was located February 15, 1913, the year after the street was built (Ex. K-1, p. 244), and by reference to the location notice and the map attached to plaintiff's complaint (p. 25), it will be observed that it covers the greater part of the ground in dispute. Any right under this location is confessedly subsequent to the street.

C.

Appellee Took Premises Subject to Prior Servitude.

Assuming the land belonged to the Indians at the time the street was established, and assuming the court holds that the Indian rights were non-alienable, the Indian deeds amounted to an abandonment

or relinquishment. Between that abandonment and the attachment of appellee's rights there was a period at which the premises were public, at least hypothetically, during which period the rights of the city attached.

Maffet vs. Quine, 93 Fed., 347.

In this case, Judge Bellinger, under a similar state of facts, involving right of way for flume, said:

> "There must have been an interval of time when the ownership was reinvested in the government of the United States, in order to enable them to be taken under the homestead laws, and at such time the preexisting appropriation and use would be as effective as if subsequently made, and when the title had so reinvested in the government."

2.

But assuming the court holds that the deeds from the Indians operated as a conveyance, this leaves appellee in no better position.

The actual construction of the street commenced in June, 1912, (p. 80, 109, 190). Immediately before that time several surveys had been made (p. 191). The first Indian deed, the deed from the Johnson family to Lot 1, was executed May 13, 1913 (Exhibit Z, p. 237), after the street had been open to traffic for nearly a year. The deed from Jimmie Bean to Lot B was executed still later, August 22, 1913 (Exhibit X, p. 231). The two Indian titles

here in question were therefore conveyed to appellee approximately one year after the street had been finished.

The law is well settled that a grantee of land takes the premises with whatever servitude is rightfully or wrongfully inflicted upon them during the ownership of his predecessor.

Roberts vs. Northern Pac. Ry., 158 U. S., 1;
Maffet vs. Quine, 93 Fed., 347;
Northern Pac. Ry. vs. Murray, 87 Fed., 648 (651).

In the Roberts case, Justice Shiras, on page 10, said:

> "It is well settled that where a railroad company having the power of eminent domain has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burdens of the railroad."

In *Maffet vs. Quine*, Judge Bellinger said:

> "It is settled that where a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, *whether with or without the consent of the owner* of such land, a subsequent vendee of the latter takes the land subject to the burden thus placed upon it."

If there be any merit in appellee's contention that the building of this street violated some rights of the

Indians, those Indians, under the decisions cited, may maintain an action for damages against the city and this is the only relief available.

D.

Appellee Estopped by Laches.

The court found that appellee did not consent to the construction of the street. But it is admitted that neither appellee nor its grantors objected. The street was apparently as welcome to the Alaska Juneau Gold Mining Company and to its Indian predecessors as new streets generally are to people interested in the neighborhood. It is admitted that appellee and its predecessors stood by and saw the public funds expended in building this street without uttering any form of a protest or without notifying the city authorities that the latter were intruding on private rights. The lower court defends appellee's unseemly behaviour in this respect, by arguing that it had no authority to start a law suit until it had actual use for such rights. This may be law, but it is not equity, and this is an equity case, and as such is an appeal to the conscience.

As to the Indians, they claimed the right to the beach and right of ingress and egress with their boats and canoes. They certainly can not offer the excuse that they had no right to object or protest when their ingress and egress was shut off by the street,—if, indeed, they considered their right of in-

gress and egress more valuable to their premises than the street itself, which is doubtful.

To stand by in silence and see the public money expended on this thoroughfare, reap the benefit of having a seemingly indispensable roadway constructed to and over its property, and then insist that the public have no rights there, is not coming into court with clean hands.

The appellee could not succeed in an action to enjoin the city from maintaining the street.

> *Roberts vs. Northern Pac. Ry., supra;*
> *Northern Pac. Ry. vs. Smith,* 171 U. S., 260;
> *United States vs. Lynah* [illegible] U. S., 445;
> *Miocene Ditch Co. vs. Jacobsen,* 146 Fed., 680;
> *McCauley vs. Western V. Ry. Co.,* 33 Vt., 311;
> *Dodd vs. St. Louis & H. Ry. Co.,* 108 Mo., 581;
> *Maffet vs. Quine, supra;*
> *Cawley vs. City of Spokane,* 99 Fed., 840;
> *Sherlock vs. Ry. Co.,* 150 Ind., 22.

In the Vermont case above quoted, the court in the course of the opinion said:

> "In these great public works the shortest period of clear acquiescense so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in

operation, whereby the public acquire important interests in its continuance."

In *Roberts vs. Northern Pac. Ry., supra,* the court said:

"It has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road, without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein and be restricted to a suit for damages."

In *Dodd vs. St. Louis & H. Ry. Co.,* the court said:

"It is clearly well settled that a party, who, with full knowledge, stands by and permits a company to spend large sums of money in the construction of a railroad through his land, without objection, forfeits his right of ejectment. This right is forfeited by virtue of the application of the doctrine of estoppel, as well as the *intervention of property interest.* Property in a railroad is peculiar. A railway may be likened to a chain, which is worthless with one link out. The ejectment of the company from a mile or half a mile of its track almost wholly destroys the value of its entire line."

The laches of appellee in allowing the street without objection to be constructed and maintained has mislead appellant, to his injury, to believe that appellee had no littoral rights over the premises in question.

Appellant purchased the mill property from Alaska Supply Co., on the 24th day of March, 1913 (Ex. 3, p. 210). Mr. Worthen, the president and manager of the appellant company, was at that time a stranger in the country and when he arrived in Juneau Franklin Street was in use as a highway (pp. 92 and 200) and he had a right to assume and rely upon it that this street was invested with all the legal characteristics of any other public thoroughfare.

If the theory of the lower court be correct, a littoral owner may stand by in silence and see the public expend millions of dollars in public improvements, by way of streets, piers and wharves, and when it pleases him he may walk in and take possession of the whole works.

The cases cited in this and the succeeding chapter of this brief all involve direct attack upon the legality of the public utility in question. In the case at bar appellee evinces an intention to leave the street intact, but in its collateral attack attempts to have it declared illegal, without going to the trouble of making the city a party to the action.

E.

Element of Estoppel Not Necessary.

But though the courts have held that one, who, without protest, stands by and sees public money spent in construction of public utilities, does not come into court with clean hands when he afterwards asks for relief against these same improvements, the same courts also at the same time hold that laches is not in any way necessary to defeat such claim for relief. The courts uniformly go much further and hold that even if the street were constructed illegally,—yes, even if it had been constructed by force and over the land owner's objection, it would be no less a public highway and can not be closed by the courts.

Kamper vs. Chicago, 215 Fed., 706;
Osborne vs. Missouri Pac. Ry., 147 U. S., 248;
Doane vs. Ry., 165 Ill., 510; 46 N. E., 520;
Whittlesey vs. Hanford, 23 Conn., 421;
Johnson *vs. Railways*, 127 S. W., 63;
Griffin vs. Railway, 64 S. E., 16;
New York City vs. Pine, 185 U. S., 93;
McCullough vs. City of Denver, 39 Fed., 307;
McCarthy et al. vs. Bunker Hill & Sullivan, 164 Fed., 927.

The court below in his opinion stated that these authorities were decided upon the principle of estoppel. It is evident he has not read them.

In *Kamper vs. Chicago*, *supra*, decided last spring, plaintiff sought mandatory injunction compelling the

city to remove a water conduit constructed through plaintiff's premises seventy feet below the surface and unknown to him or his predecessors in interest. There could be no element of estoppel present. The Circuit Court of Appeals, Seventh Circuit, through Judge Baker, summarized the legal authorities on the subject in the following language:

> "When a public or quasi public corporation, having the delegated power of eminent domain, without condemnation proceedings, enters upon land (which the owner would be powerless to hold against appropriation for public use) and thereupon completes a public work and is using it in public service, the land owner will not be permitted, by ejectment or mandatory injunction, to retake possession and thus break in two a railroad or a water tunnel or other work which is being used as an entirety for the public good. This is so, not because equity refuses to frown upon unlawful seizure, but because equity will not tolerate a possessory demand being turned into a means of oppression and extortion, and because a consideration of the rights and convenience of the public outweighs the qualified possessory right of the owner,—a right he could not have absolutely maintained even initially as against the public use. And equity sufficiently indicates its disapproval of the wrongful taking by pointing the owner to the law courts, where his right to compensation can be determined."

On the strength of this basic principle, Judge Hallett, in *McCullough vs. Denver, supra,* held that he was without jurisdiction to enjoin the maintenance of a water conduit, though it was laid by force of arms over the land owner's protest, and on the Sabbath, because it was a public utility and the defendant could ultimately acquire possession by right of eminent domain, and the plaintiff had remedy by action for damages,—which is all he could have gotten had the city originally proceeded lawfully. Where was the feature of estoppel in that case?

In *Osborne vs. Railway, supra,* plaintiff sought injunction against the building of a railway on a street in front of his premises. The bill was filed *several days* before the work commenced. The court directed it be dismissed without prejudice to complainant's rights to sue at law for the damages which it claimed to have suffered, and a decree to that effect was accordingly entered. There was no element of estoppel present in that case, but the court in the decree said:

> "But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is in the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work. And if the case discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere."

The opinion in *Maffet vs. Quine*, quoted heretofore, was still stronger.

The decision in *Doane vs. Railway, supra*, is an interesting and instructive discussion of this whole subject. In that case the owner of lots abutting on the street sought injunction against the building of an elevated railway in front of his premises, whereby the latter were irreparably and permanently injured. The structure was without authority in law and action was instituted before work had commenced and as soon as the intent of defendant became definitely known. There was no waiver, nor estoppel, nor laches. The relief prayed for was denied and plaintiff was referred to his right to sue for damages. The discussion is pertinent because the abutting owner on the street is in exactly the same position as abutting owner on navigable water; both abut on the public highway. The injury of both consists in being obstructed in their access to the highway in front of the premises.

In *Whittlesey vs. Hanford*, the records show that a railroad was built over land without consent of plaintiff, who was a part owner of the premises, and without condemnation proceedings or payment of damages. Relief was denied. The court said:

> "He (plaintiff) now calls upon the court to enjoin the company against the use of their road over the land in which he had an interest, simply because that interest has not been taken legally. This cannot be done without great in-

jury to the company and serious loss and inconvenience to the public in being deprived of the railroad facilities furnished by the company. It probably would be more for their interest to pay the plaintiff ten fold or even one hundred fold the amount of his share of the damages, according to the assessment of the appraisers, than have their operations stopped in the manner prayed for in the bill.

"We will not say that the plaintiff in applying for an injunction intended thereby to take an undue advantage of the company and extort from them unreasonable damages as no such fact has been found. Yet, it is perfectly obvious that a decree to that effect would place the company in a situation in which they must either submit to such terms as plaintiff might exact, or to great loss and damage in their business."

If the foregoing decisions are to be considered authoritative by this court, it is obvious that in a direct proceeding against the city the land owner could not succeed in having the street closed in front of his premises, for the reason that the city has the power of eminent domain, which it could exercise at any time, and that under the law all that the land owner would be entitled to, in the first place, would be damages, and these he could recover in an action at law, even at the present time.

The only question which remains under this heading is whether or not the city of Juneau has the power of eminent domain. This, however, is not debatable. (Sections 627 and 633, Compiled Laws of Alaska).

And this court has held that the city may condemn rights to the tide lands.

Ashby vs. City of Juneau, 174 Fed., 737.

It must be obvious, also, that if the appellee could not succeed upon a direct attack in closing the street, were he the littoral owner, he should not be permitted to succeed on a collateral attack in getting a decree that the street is not a public thoroughfare. The street being open to the public and no rights intervening between it and tide waters, which latter are also a public highway, the public had full right to pass from the one highway to the other highway, and appellee's right in that respect is no greater than that of the public. The right which appellee claims as the foundation of this action is therefore a public right. Interference with that right is a public nuisance and not a private nuisance, and can be enjoined only at the instance of the public, through the proper officials.

VI.

RIGHT TO WHARF OUT.

The object of this action is expressed by witness Bradley, the superintendent of appellee company, on page 146, in the following language:

> "We will establish a wharf there for the receiving of coal, and on this wharf would be built coal bunkers."

This proposed wharf was then marked on the map (Ex. Y, p. 236) by this witness (p. 150).

The court finds as a fact that appellee intends to build such a wharf (pp. 46 and 48). And as a conclusion of law (p. 51) it is found that appellee is entitled to an injunction restraining appellant from maintaining any possession which would interfere with the construction of this wharf.

It will be observed that the lower court in his opinion maintained that the upland owner has an absolute and vested right as littoral owner to erect wharves from the upland, over tide lands and into deep water in front of his premises. In this, as has been already remarked, the lower court confounded the right of ingress and egress with the right to erect wharves.

It will not be disputed that the navigable waters of the sea extend to mean high tide. Nor that navigable water up to mean high tide is a public highway. Nor that the title to and ownership of the soil under the water is in the government.

Shively vs. Bowlby, 152 U. S., 1;
Weber vs. State Harbor Commissioners, 85 U. S., 57;
Ferry Pass Inspectors et cetra Ass'n. vs White River Inspectors et cetra Ass'n., 22 L. R. A., (N. S.) 345;
McCloskey vs. Pacific Coast, 160 Fed., 794.

In the McCloskey case, this court said:

> "There can be no doubt, therefore, that the appellee, while it had *not* the right to wharf out on the tide lands in front of its property, was, if its land abutted the shore, entitled to free access to the navigable waters at all points in front thereof."

In *Weber vs. State Harbor Commissioners*, Justice Field said:

> "By that law (the common law) the title to the shore of the sea and of the arms of the sea and in the soils under tide waters is in England in the King, and in this country in the State. Any erection thereon, without license, is therefore deemed an encroachment upon the property of the sovereign, or as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

In that case Justice Field referred to statutes and "immemorial usage" as establishing a different rule, but it is evident that by "immemorial usage" he had in mind the laws and the usages of Rhode Island and

Connecticut subsequently discussed by Justice Gray in *Shively vs. Bowlby*, where this subject is exhaustively discussed and finally settled. Said the Supreme Court in the latter case:

> "By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture and may, at the suit of the King, either be demolished or be seized and rented for his benefit, if it is not a nuisance to navigation."

Referring to a recent decision by the House of Lords, the court further said:

> "The right thus recognized, however, is not a title in the soil below high water mark, *nor a right to build thereon*, but a right of access only, analagous to that of an abutter on a highway."

To this doctrine of the common law, the Supreme Court in the Shively case expressly gave its assent and affirmed that the rule was the same in the United States. Accordingly, it was held that the State might convey by deed the title to the soil below mean high tide line, and under such conveyance the grantee had a right to shut off the upland owner from access to navigable waters in front of his premises. This is not only the rule of the Supreme Court of the United States, but of most of the courts throughout the country.

Henry Dalton & Sons Co. vs. City of Oakland, 143 Pac., 721;

Ferry Pass Inspectors et cetra Ass'n. vs. White River Inspectors et cetra Ass'n., 22 L. R. A., (N. S.) 345;

Turner vs. People's Ferry Co., 21 Fed., 90;

Gould vs. Hudson River R. R. Co., 6 N. Y., 522;

People vs. Vanderbilt, 26 N. Y., 287;

People vs. New York & S. I. Ferry C.o,, 68 N. Y., 71;

Hoboken vs. Penn. Ry. Co., 124 U. S., 656;

Ravenswood vs. Fleming, 46 Am. Rep., 485 (499).

In the most recent decision on this subject is found a most lucid resume of the law by Chief Justice Whitfield of the Supreme Court of Florida, where, among other things, it is said:

> "In the absence of a valid grant from the State, no riparian owner or other person has an exclusive right to do business upon public waters of the State, whether such waters are in front of the land of the riparian owner or not."
>
> *Ferry Pass Inspectors, supra.*

Nearly twenty years prior to the decision of *Shively vs. Bowlby*, the Supreme Court passed upon the very question here under discussion, in *Atlee vs. Northwestern U. P. Co.*, 88 U. S., 389, where it is said by Justice Miller:

> "He (defendant) rests his defense solely on the ground that at any place where a riparian owner can make such a structure useful to his

personal pursuits or business, he can, without license or special authority, and by virtue of this ownership, and his own convenience, project the pier or roadway into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway on the channel unobstructed. *No case known to us has sustained this proposition, and we think its bare statement sufficient to show its unsoundness.*"

Congress, by the River and Harbor Act, has prescribed the rules and conditions under which a littoral owner may wharf out.

6 *Federal Stat. Ann.*, 813 et seq;
30 *Stat. L.*, 1151.

Under these enactments the appellee, even were it the littoral owner, had no right to wharf out without having first obtained the permission of the Secretary of War, in the manner provided by statute. To do so would be a criminal offense.

The decision of the lower court amounts to a license extended to appellee to violate the laws of the nation which, by the Act of July 27, 1868, (Ch. 273 S. I. Vol. 15, Stat. L., p. 240) were made applicable to Alaska.

Appellee's Authorities.

The lower court based his decision of this question on the early cases of Yates vs. Milwaukee and Dutton vs. Strong. These cases have been frequently referred to by the Supreme Court in subsequent de-

cisions and are explained and modified in their applications by that court in Shively vs. Bowlby, as well as in other cases from the same tribunal.

The Dutton case is discussed on page 37 and the Yates case on page 39 of 152 United States Reports. These cases were again discussed and explained by the same tribunal in the still more recent case of *Scranton vs. Wheeler*, 179 U. S., 141, where Justice Harlan, on page 158, refers to and distinguishes the Yates case, *inter alias*, in the following language:

> "The decision in Yates vs. Milwaukee cannot be regarded as an adjudication upon the particular point involved in the present case. That, as we have seen, was a case in which the riparian owner had, *in conformity with law*, erected a wharf in front of his upland in order to have access to navigable water. The city of Milwaukee attempted arbitrarily and capriciously to destroy or remove the wharf that had lawfully come into existence, and was not shown, in any appropriate mode, to have been an obstruction to navigation. It was a case in which a municipal corporation intended the actual destruction of tangible property belonging to a riparian owner and lawfully used by him in reaching the navigable water."

The Dutton case was interpreted in the following language by Justice Gray, in Shively vs. Bowlby:

> "The only point adjudged was that, the plaintiff's vessel, having been wrongfully attached

> to the pier, the defendants, after she had been requested and had refused to leave, had the right to cut her loose, if necessary to preserve the pier from destruction or injury. There can be no doubt of the correctness of that decision; for, even if the pier had been unlawfully erected by the defendants as against the State, the plaintiffs had no right to pull it down or injure it, and upon the facts of the case were mere trespassers upon the defendant's possession."

Unfortunately, however, this court in the Dalton case quotes as authoritative certain obiter and thoroughly repudiated expressions of the Supreme Court in the Dutton case, expressions which, since the decision of the Shively case, are no longer authoritative, if they ever were; and which, in addition thereto, were obiter even to the decision of the case in which they were used. Nevertheless, they have lent color to appellee's contentions and have formed the basis of the opinion of the lower court. It will also be observed that the very language used in the Yates case, which the Supreme Court has repudiated repeatedly, is quoted and relied upon by the lower court as the law.

In spite of the language used, this court did not, in the Dalton case, decide that the littoral owner had an absolute and vested right to wharf out, but simply that he had a right to have obstruction of his access to navigable water enjoined. Everything said beyond that is purely obiter.

The confusion found in the books at times on this subject arises from the statutory provisions enacted in the various localities touching title to tide flats and the right to wharf out, and to careless language at times used *arguendo* by courts.

The doctrine of the lower court that the littoral owner had the absolute right to construct wharves over tide lands to deep water, irrespective of any statute permitting it, is in direct conflict with the doctrine that navigable waters are public highways clear up to line of mean high tide, which latter is too well established to need extended remark.

VII.

PRIOR POSSESSION PROTECTS APPELLANT.

Throughout the trial of this case could be heard the persistent blare about appellee's ponderous millions. It was like the constant rumble of overhead thunder. The dollar sign was plastered over everything. Counsel talked about the millions invested and the millions to be invested as if he expected everybody to be stricken with paralysis at the astonishing figures. His swaggering refrain has found its way even into the opinion of the lower court.

But legal rights will not be measured by the size of bank accounts. If appellee is in law entitled to the property in question, this judgment should be affirmed; if not, it should be reversed, though the Alaska Juneau Gold Mining Company overstride the world like a colossus.

Nor will the fact that a litigant is only a squatter on the public domain, whether above or below tide line, render him, under the law, subject to any bully who may want to elbow him off the earth. Mere possession is sufficient to protect him against one who has no better title. From times immemorial squatters on the public domain of the United States have enjoyed the same protection from the courts as if they were owners, except as against the Government. The courts will even entertain actions in ejectment to recover a mere squatter's possession illegally lost.

Haws vs. Mining Co., 160 U. S., 303 (317);
Sabariego vs. Maverick, 124, U. S., 261 (299);
Oregon Ry. & Nav. Co. vs. Hertzberg, 37 Pac. 1019 (1021);
Hammond vs. Shephard, 57 N. E., 867.

The evidence shows that the sawmill here in question was established in 1902. It is situated partly above and partly below line of mean high tide, as will be seen from the original blueprint, Exhibit 8, attached to the transcript. It was stipulated that the so-called "Warner" line of mean high tide was the correct line (pp. 168-9). On the printed copy of this exhibit, (p. 218), this line has become obliterated.

On the tide flats and in the adjoining waters a booming ground was established. This took place in 1902 and continued ever after. There was no evidence that appellee thought of the beach till in 1913 (p. 107).

During 1912, the Alaska Supply Company, then the owner of the mill, extended the line of dolphins on the outer side of the booming ground, and also set a row of piles on the shore side thereof and where the street was later built. In the spring of 1913, commencing in March, the piles were driven for the platform on the lower side of the street (pp. 92-95) and appellant continued the work of perfecting the platform until enjoined by the court in this action (pp. 92-95 and 110-111).

Meanwhile, and during the previous years, appellant and its grantor had been in full, exclusive, peaceful possession. The premises were especially adapted for this purpose and the court's decision puts appellant out of business (p. 199). It is shown that for the enjoyment of this upland below the street on which the mill is built, the latter must have unobstructed use of the waters to the southeast along the shore, for the floating of the logs. It is therefore suffering a special, private injury by having that part of the navigable waters obstructed by appellee's proposed wharf.

The Government has as good right to give away the tide land as it has to give away the upland; and if it sees fit to leave a citizen in the unobstructed possession of the tide lands, no private individual is in position to molest him. Appellant must, therefore, be treated in this case as being lawfully on the premises until it is established that appellee has better legal right thereto. The decision of the court in this

case has the effect of enjoining appellant out of possession and enjoining appellee into possession of the premises.

It is respectfully submitted that the judgment herein should be reversed and the appellee directed to restore the appellant to that full possession of the tide lands and adjoining waters which it had prior to judgment, the learned court below having refused a supersedeas.

Respectfully submitted,

JOHN RUSTGARD,

Attorney for Appellant.